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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re

CLEAR CREEK RANCH II, LLC,
a Nevada limited liability company,

Debtor.

Case No.: 11-52302

Chapter 11

**DEBTOR'S MOTION FOR ORDER
AUTHORIZING REJECTION OF
EXECUTORY CONTRACTS AND
UNEXPIRED LEASES**

Date: September 28, 2011
Time: 10:00 a.m.
Est. Time Req'd: 10 minutes

Clear Creek Ranch II, LLC, a Nevada limited liability company ("CCR II" or the
"Debtor"), as debtor in possession, files this Motion for Order Authorizing Rejection of Executory
Contracts and Unexpired Leases (the "Motion"), and respectfully represents as follows:

I. JURISDICTION AND VENUE

The district court has jurisdiction over this matter under 28 U.S.C. § 1334. This Court may hear this proceeding under Local Rule 1001(b)(1) and 28 U.S.C. § 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and 11 U.S.C. § 365. The venue of the Debtor's chapter 11 case and this motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409 and Local Rules.

II. FACTUAL BACKGROUND

Clear Creek at Tahoe, LLC, a Nevada limited liability company ("CCT"), the debtor and debtor in possession in Case No. 11-52303, was formed in 2007 for the purpose of co-developing a multifaceted real estate project near Lake Tahoe (the "Project"). *See*, Declaration of James S. Taylor In Support of Debtor's Motion For Order Authorizing Rejection Of Executory Contracts and Unexpired Leases ("Taylor Decl."), ¶ 3, filed concurrently herewith. Since then, the members of CCT have raised tens of millions of dollars, built a world class golf course, designed a residential community, and acquired the rights to a lake house on Lake Tahoe and a fly fishing ranch along the West Walker River for use as amenities for residents of the Project.¹ *Id.*

More specifically, the Project includes the following:

(a) Residential Land. CCT is the sole record owner of CCR II, which was formed in 2008 and owns the residential portion of the Project consisting of approximately 531 acres of real property entitled for the construction of 384 residential units – 221 estate homes on lots ranging from 1 to 5.48 acres and up to 163 cottages (the "Residential Subdivision"). *Id.* at ¶ 4.

(b) Golf Course Land. The parties created the Club at Clear Creek Tahoe, Inc. (the "Club") to take title to the golf course. CCT is the sole record owner of the Club. *Id.*

(c) Open Space. The rest of the Property is owned by CCR to be designated as open space by placing a conservation easement on that land. CCT is the sole record owner of CCR.

While CCT is the sole record owner of CCR II, CCR and the Club (the "Developer Entities"), the true nature of CCR II and the other Developer Entities is that of a joint venture between CCT and John Serpa, Sr., his sons, Keith Serpa and John Serpa, Jr., and their affiliates

¹ A full description of the Project can be found at [http://www.clearcreektahoe.com /index.php](http://www.clearcreektahoe.com/index.php). Taylor Decl. at ¶ 3.

1 including a Serpa owned entity named Nevada Friends, LLC ("Friends") (collectively, the
2 "Serpas").²

3 Although the Club held legal title to the golf course land, CCR II developed and managed
4 the golf course. As such, the creditors, employees and vendors of the golf course all looked to
5 CCR II for payment as the developer and operator. Given this economic reality, and the conduct
6 of the parties, CCT and CCR II treated the golf course property as being owned by CCR II for tax
7 purposes. The remaining assets, if any, and the liabilities related to the development and operation
8 of the golf course therefore appear on the schedules and statement of affairs of CCR II. As such,
9 CCR II asserts it has the right and standing to reject executory contracts entered into by the Club.
10 The construction lender for the golf course, Textron Financial (also known as Dorfinco)
11 ("Textron"), asserts that it foreclosed its lien on the golf course land and the Club's personal
12 property on July 13, 2011. *Id.* at ¶ 5.

13 On July 18, 2011 (the "Petition Date"), CCR II filed its voluntary petition for relief under
14 chapter 11 of the Bankruptcy Code (and so did CCT). CCR II is continuing in possession of its
15 property and is operating and managing its business, as debtor in possession, pursuant to sections
16 1107 and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner
17 has been made, and no creditors' committee has yet been appointed by the Office of the United
18 States Trustee. *Id.* at ¶ 6.

19 **III. RELIEF REQUESTED**

20 By this Motion, CCR II seeks entry of an Order rejecting as of the notice date of this
21 Motion, the following unexpired leases and executory contracts: (i) the Jonas Agreement; (ii) the
22 PNC Lease; (iii) the TCFEF Agreement; and (iv) the Textron Agreement (as such terms are
23 defined below).

24 **IV. BASIS FOR RELIEF**

25 Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's
26 approval, may assume or reject any executory contract or unexpired lease of the debtor."

27 _____
28 ² Also see, the adversary proceeding captioned Clear Creek Ranch II, LLC, et al. v. Nevada Friends, LLC, et al., Case No. 11-05075 filed on July 26, 2011 [Docket No.1].

11 U.S.C. § 365(a). The test articulated by most courts for deciding whether to authorize rejection of a lease is simply whether rejection would benefit the estate, which is referred to as the "business judgment" test. Agarwal v. Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.), 476 F.3d 665, 670 (9th Cir. 2007); Lubrizol Enterprises v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043 (4th Cir. 1985); Control Data Corporation v. Zelman (In re Minges), 602 F.2d 38 (2nd Cir. 1979). The rule as applied to a debtor's decision to reject a lease requires that the decision be accepted by court unless it is shown that the debtor's decision was one taken in bad faith or in gross abuse of business discretion. In re Lubrizol, 756 F.2d at 1047; see also In re G Survivor Corp., 171 B.R. 755, 757-58 (Bankr. S.D.N.Y. 1994) (it is enough if, as a matter judgment, rejection of the contract may benefit the estate.) Courts recognize that the right of a debtor to reject contracts is fundamental to the bankruptcy process; it provides an important mechanism through which a debtor can be relieved of financially burdensome agreements while it attempts to reorganize. See Navellier v. Sletten, 262 F.3d 923, 946 n.12 (9th Cir. 2001); FDIC v. Castetter, 184 F.3d 1040, 1043 (9th Cir. 1999); see also In re Chi-Feng Huang, 23 B.R. 798, 801 (9th Cir. B.A.P. 1982) ("The primary issue is whether rejection would benefit the general unsecured creditors.").

Here, prior to the Petition Date, CCR II and the Club were parties to various unexpired leases and executory contracts. CCR II seeks to reject the contracts with the following third parties:

(a) Jonas Software USA Inc.: This agreement was entered into on or about March 17, 2009, by and between Jonas Software USA Inc., as Distributor, and the Club, as Customer (the "Jonas Agreement"). The Jonas Agreement provides for an original purchase price of \$24,300 for the use of certain software, \$6,075 for support and enhancement services, and \$6,000 for training and installation services. The Jonas Agreement provides for monthly payments of \$757.81, plus applicable taxes, over a term of 48 months, for the use of the software, support and enhancement fees, and training and installation services. As of the Petition Date, the outstanding balance remaining to be paid on the Jonas Agreement was \$15,531.53. The Jonas Agreement grants the Club a non-exclusive, non-transferable license to use various software programs associated with

1 the operation of the golf course. Under the terms of the Jonas Agreement, title to the software
 2 transfers to the Club at the conclusion of the Jonas Agreement term with no additional payment.
 3 Taylor Decl. at ¶ 7.

4 CCR II takes the position that the portion of the Jonas Agreement requiring payment for
 5 the use of the software creates a secured transaction, and not a true lease, because the Club's
 6 obligations are for a term and is not subject to termination by the Club, the term of the Jonas
 7 Agreement is equal to or greater than the remaining economic life of the software and title to the
 8 software transfers to the Club at the conclusion of the Jonas Agreement term. See Uniform
 9 Commercial Code § 1-201(35) (definition of security interest); § 1-203 (factors that favor a
 10 finding of security interest rather than lease).³ The nondebtor counterparty did not file a financing
 11 statement, so the security interest is unperfected and avoidable by CCR II as debtor in possession.
 12 See UCC § 9-317; 11 U.S.C. § 544. Accordingly, the software which is the subject of the Jonas
 13 Agreement is property of CCR II's bankruptcy estate and the agreement is not capable of being
 14 assumed or assigned. However, out of an abundance of caution, in the event the Court determines
 15 the portion of the Jonas Agreement relating to the software use is a true lease, CCR II also seeks to
 16 reject this portion of the Jonas Agreement. Furthermore, the portion of the Jonas Agreement
 17 requiring payment for support and enhancement services, and training and installation services, is
 18 an executory contract, and should therefore be rejected.

19 (b) PNC Equipment: This lease was entered into on or about May 26, 2009, by and
 20 between National City Golf Finance, a division of National City Commercial Capital Company,
 21 LLC, as Lessor, and the Club, as Lessee (the "PNC Lease"). The PNC Lease provides for monthly
 22 payments of \$2,712.30, plus applicable taxes, over a term of 48 months, for the use of golf carts.
 23 The Club provided a \$20,000 security deposit at the time the PNC Lease was entered into. There
 24 is a fair market value buyout option for the golf carts at the conclusion of the PNC Lease term.
 25 Id. at ¶ 8.

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 28 ³ Although this citations are to the official "uniform" UCC, the enactments in the various states
 are not materially different.

(c) TCF Equipment Finance: This agreement was originally entered into on or about July 21, 2008, by and between Textron Financial and CCR II (the "Textron Agreement"), a portion of which was subsequently assigned by Textron Financial to TCF Equipment Finance ("TCFEF") on or about September 30, 2009 (the "TCFEF Agreement"). The TCFEF Agreement provides for monthly payments of \$377.47, plus applicable taxes, over a term of 50 months, for the use of golf maintenance equipment. As of the Petition Date, the outstanding balance remaining to be paid on the TCFEF Agreement was \$8,755.34, consisting of \$3,947.32 in past due accruals, and \$4,808.02 remaining to be paid on the TCFEF Agreement. To date, CCR II has paid \$10,569.16 for the equipment listed on the TCFEF Agreement. Id. at ¶ 9.

CCR II takes the position that the TCFEF Agreement creates a secured transaction, and not a true lease, because CCR II's obligations are for a term and is not subject to termination by CCR II, the term of the TCFEF Agreement is equal to or greater than the remaining economic life of the equipment, and title to the equipment transfers to CCR II at the conclusion of the TCFEF Agreement term.⁴ Accordingly, the equipment which is the subject of the TCFEF Agreement is property of CCR II's bankruptcy estate and the agreement is not capable of being assumed or assigned. However, out of an abundance of caution, in the event the Court determines the TCFEF Agreement is a true lease, CCR II also seeks to reject the TCFEF Agreement.

(d) Textron Financial: The portion of Textron Agreement that was not assigned to TCFEF provides for varying monthly payments based on the four equipment lease schedules, over a term of 50 months, for the use of golf maintenance equipment. The four equipment schedule numbers which are part of the unassigned portion of the Textron Agreement are:

(i) Equipment Schedule No. 1027892: Monthly payments are \$2,498.92, plus applicable taxes. As of the Petition Date, the outstanding balance remaining to be paid on Equipment Schedule No. 1027892 was \$80,948.80, consisting of \$19,987.36 in past due accruals, \$999.36 in finance charges, and \$59,962.08 remaining to be paid on Equipment Schedule No.

⁴ See the true lease/secured transaction discussion on page 5.

1 1027892. To date, CCR II has paid \$69,955.76 for the equipment listed on Equipment Schedule
2 No. 1027892. Id. at ¶ 10.

3 (ii) Equipment Schedule No. 1028125: Monthly payments are \$913.17, plus
4 applicable taxes. As of the Petition Date, the outstanding balance remaining to be paid on
5 Equipment Schedule No. 1028125 was \$29,586.64, consisting of \$7,305.36 in past due accruals,
6 \$365.20 in finance charges, and \$21,916.08 remaining to be paid on Equipment Schedule No.
7 1028125. To date, CCR II has paid \$25,568.76 for the equipment listed on Equipment Schedule
8 No. 1028125. Id.

9 (iii) Equipment Lease No. 1028327: Monthly payments are \$1,050.28, plus
10 applicable taxes. As of the Petition Date, the outstanding balance remaining to be paid on
11 Equipment Schedule No. 1028327 was \$34,029.04, consisting of \$8,402.24 in past due accruals,
12 \$420.08 in finance charges, and \$25,206.72 remaining to be paid on Equipment Schedule No.
13 1028327. To date, CCR II has paid \$29,407.84 for the equipment listed on Equipment Schedule
14 No. 1028327. Id.

15 (iv) Equipment Lease No. 1028712: Monthly payments are \$557.77, plus
16 applicable taxes. As of the Petition Date, the outstanding balance remaining to be paid on
17 Equipment Schedule No. 1028712 was \$17,848.64, consisting of \$4,462.16 in past due accruals,
18 and \$13,386.48 remaining to be paid on Equipment Schedule No. 1028712. To date, CCR II has
19 paid \$15,617.56 for the equipment listed on Equipment Schedule No. 1028712. Id.

20 CCR II takes the position that the unassigned portion of the Textron Agreement creates a
21 secured transaction, and not a true lease, because CCR II's obligations are for a term and is not
22 subject to termination by CCR II, the term of the unassigned portion of the Textron Agreement is
23 equal to or greater than the remaining economic life of the equipment, and title to the equipment
24 transfers to CCR II at the conclusion of the Textron Agreement term.⁵ Accordingly, the
25 equipment which is the subject of the unassigned portion of the Textron Agreement is property of
26 CCR II's bankruptcy estate and the agreement is not capable of being assumed or assigned.

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28 ⁵ See the true lease/secured transaction discussion on page 5.

1 However, out of an abundance of caution, in the event the Court determines the unassigned
 2 portion of the Textron Agreement is a true lease, CCR II also seeks to reject the unassigned
 3 portion of the Textron Agreement.

4 As described above, the construction lender for the golf course, Textron, claims to have
 5 foreclosed its lien on the golf course land and the Club's personal property on July 13, 2011, just
 6 before CCR II filed its bankruptcy petition. Thus, Textron claims that it now owns the golf course
 7 land. As part of its prepetition and ongoing restructuring efforts, CCR II has determined that
 8 CCR II no longer receives a benefit from the unexpired leases and executory contracts described
 9 above because they do not benefit the Residential Subdivision or the open space and due to
 10 Textron's alleged foreclosure sale of the golf course. Id. at ¶ 11. Accordingly, CCR II has
 11 determined that, in its business judgment, rejecting the unexpired leases and executory contracts
 12 described above is in the best interests of the bankruptcy estate and the creditors thereof.
 13 Id. at ¶ 12.

14 V. CONCLUSION

15 WHEREFORE, the Debtor respectfully requests that this Court grant the relief requested
 16 herein, enter an Order rejecting the Jonas Agreement, the PNC Lease, the TCFEF Agreement, and
 17 the Textron Agreement, to the extent any of them are true leases or executory contracts, all
 18 effective as of the notice date of this Motion, and grant CCR II such other and further relief as is
 19 just and proper.

20 Dated: August 31, 2011

21 ALLEN MATKINS LECK GAMBLE
 22 MALLORY & NATSIS LLP
 23 Vincent M. Coscino (CA Bar No. 122086)
 24 Thomas E. Gibbs (CA Bar No. 93819)
 25 Richard M. Dinets (CA Bar No. 265197)

26 and

27 LAW OFFICES OF AMY N. TIRRE

28 By: /s Amy N. Tirre
 Amy N. Tirre (Bar No. 6523)
 Proposed Counsel for the
 Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

Pursuant to FRBP 7005 and FRCP 5(b), I certify that I am an employee of Law Offices of Amy N. Tirre, that I am over the age of 18 and not a party to the above-referenced case, and that on August 31, 2011 I filed and served **DEBTOR'S MOTION FOR ORDER AUTHORIZING REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** as indicated:

X

BY NOTICE OF ELECTRONIC FILING: through Electronic Case Filing System of the United States Bankruptcy Court, District of Nevada, to the individuals and/or entities at their email addresses as set forth below:

- U.S. TRUSTEE USTPRegion17.RE.ECF@usdoj.gov
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BY HAND DELIVERY VIA COURIER: by causing hand delivery of the Document listed above via Reno Carson Messenger Service to the persons at the addresses set forth below.

BY MAIL: by placing the document listed above in a sealed envelope with Postage thereon fully prepaid in the United States Mail at Reno, Nevada, and addressed as set forth below. I am readily familiar with my office's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on 31 August 2011, with postage thereon fully prepaid in the ordinary course of business.

DATED this August 31, 2011.

/s/ Andrea Black

An Employee of Law Offices of Amy N. Tirre